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Vethri Vel a/l Yamaplay v Public Prosecutor

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HIGH COURT (TAIPING) — CRIMINAL APPEAL NO AB-41S-2–01 OF 2024
NOOR RUWENA J
30 JULY 2025

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 44(1)(b) of the Road Transport Act 1987 ('the Act') for driving while under influence of alcohol thus causing deaths and injury of the victims — Appellant convicted and sentenced to four-year imprisonment with fine of RM10,000 and disqualified from holding or obtaining driving licence for five years — Whether charges under s 44(1) of Act had been proved beyond reasonable doubt — Road Transport Act 1987 ss 41(1) & 44(1)(b)

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On 13 February 2018, at about 10.20pm, a fatal motor vehicle accident occurred involving a car and a trailer. The car was driven by the deceased with his family members comprising his wife, two sons and sister-in-law as passengers while the trailer was driven by the appellant. According to eyewitnesses, the car had just come out from an eating shop by the roadside when the trailer came down fast from a curved fly-over and encroached into the car's path before ramming its front. Only the eldest son survived the crash but suffered severe traumatic brain injury. The appellant was detained and brought to the hospital for treatment as he had some light injuries from the accident. An analysis conducted by the chemist ('SP13') showed that 201mg per 100ml of ethyl alcohol was detected in the appellant's blood specimen ('exh P16'). The appellant was charged with two charges under s 44(1)(b) of the Road Transport Act 1987 ('Act') for driving while under the influence of alcohol thus causing the deaths and injury of the victims. The magistrate found the appellant guilty of both charges and sentenced to a four-year imprisonment and a fine of RM10,000, in default one year imprisonment for each charge. He was also disqualified from holding or obtaining a driving licence for five years. Hence, this appeal. The issue for consideration was whether the charges under s 44(1) of the Act had been proved beyond a reasonable doubt.

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Held, allowing the appeal against conviction in part and dismissing the appeal against sentence:

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(1) The magistrate's use of the words 'dalam keadaan melulu dan cuai' in respect of the third ingredient of the offence, was not in accordance with the wording in s 44(1)(b) of the Act. Under s 44(1)(b), which the prosecution relied on, it was not the issue of him driving 'dalam keadaan

melulu dan cuai' but that he committed the offence when he was driving the trailer on the road, while having so much alcohol in his body that the proportion of it in his breath, blood or urine exceeded the prescribed limit, and caused the death or injury of the deceased's family and family members. Next, in exh P16, SP13 stated that as there was no information whether any preservatives were added to the specimen analysed, and if none were so added, the value obtained from the chemical analysis may not reflect the actual alcohol content in the appellant's blood when the specimen was taken. Despite the result obtained in the analysis of the appellant's blood specimen in line with the requirements of the Act, there was a doubt on the actual alcohol content in the appellant's blood at the material time, in view of the observation made in exh P16 by SP13. Exhibit P16 relied on by the prosecution must be free from any doubt, ie it must have the accurate result of the analysis. By accepting exh P16 despite the observation made by SP13, the magistrate had made an error (see paras 23 & 26).

(2) The evidence supported a case of s 41(1) of the Act, ie causing death by reckless or dangerous driving. The defence of the appellant in regard to the manner of his driving which caused the accident was just a bare denial. The condition of the brakes of the vehicle prior to the accident was good, not faulty. The appellant's explanation did not cast a reasonable doubt on the prosecution case. Even if the prosecution did not prove beyond a reasonable doubt that the appellant was driving under the influence of alcohol under s 44(1)(b), due to the technical requirement of preserving the integrity of the blood specimen properly, he had committed the offences of dangerous driving under s 41(1) of the Act. The appellant had, by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which was or might be expected to be on the road) was dangerous to the public, caused the death of the victims. Therefore, the charges were amended to s 41(1) of the Act in regard to the deaths of the victims. A fifth charge was amended from s 44(1)(b) to s 325 of the Penal Code in respect of the injuries sustained by the deceased's eldest son and the appellant was sentenced to two years' imprisonment to run concurrently. On hindsight, this should not have been done. The ingredient of 'voluntarily' causing the grievous hurt may not be present on the part of the appellant. There should only be four charges against the appellant. However, the court was functus officio in that regard (see paras 32, 36, 39 & 41–43).

(3) Public interest consideration outweighed the personal interests of the appellant and a sentence of bond over under s 294(1) of the Criminal Procedure Code was not appropriate. In view of the severity of the offence, for the four charges under s 41(1) of the Act, the appellant was sentenced to eight years imprisonment and fine of RM20,000 in default

three months imprisonment for each charge. All imprisonment sentences to run concurrently and his driving licence was also suspended for three years and to be endorsed accordingly (see para 49).

[Bahasa Malaysia summary

Pada 13 Februari 2018, kira-kira pukul 10.20 malam, satu kemalangan kenderaan bermotor yang membawa maut telah berlaku melibatkan sebuah kereta dan sebuah treler. Kereta tersebut dipandu oleh si mati bersama ahli keluarganya terdiri daripada isteri, dua orang anak lelaki, dan iparnya sebagai penumpang, manakala treler dipandu oleh perayu. Menurut saksi mata, kereta baru sahaja keluar dari sebuah kedai makan di tepi jalan apabila treler datang laju dari atas jejantas berselekoh dan masuk ke laluan kereta tersebut sebelum melanggar bahagian hadapannya. Hanya anak lelaki sulung yang terselamat daripada nahas tetapi mengalami kecederaan otak traumatik yang serius. Perayu telah ditahan dan dibawa ke hospital untuk rawatan kerana mengalami kecederaan ringan akibat kemalangan tersebut. Analisis yang dijalankan oleh ahli kimia ('SP13') menunjukkan sebanyak 201mg setiap 100ml etil alkohol dikesan dalam sampel darah perayu ('eksh P16'). Perayu didakwa dengan dua pertuduhan di bawah s 44(1)(b) Akta Pengangkutan Jalan 1987 ('Akta') kerana memandu dalam pengaruh alkohol sehingga menyebabkan kematian dan kecederaan mangsa. Majistret mendapati perayu bersalah atas kedua-dua pertuduhan dan menjatuhkan hukuman penjara selama empat tahun serta denda RM10,000, jika gagal bayar hukuman penjara satu tahun bagi setiap pertuduhan. Dia juga dihalang daripada memegang atau memperoleh lesen memandu selama lima tahun. Oleh itu, rayuan ini. Isu untuk pertimbangan adalah sama ada pertuduhan di bawah s 44(1) Akta telah dibuktikan melampaui keraguan munasabah.

Diputuskan, membenarkan sebahagian rayuan terhadap sabitan dan menolak rayuan terhadap hukuman:

(1) Penggunaan kata-kata 'dalam keadaan melulu dan cuai' oleh majistret berkaitan unsur ketiga kesalahan tidak selaras dengan perkataan dalam s 44(1)(b) Akta. Mengikut s 44(1)(b), yang diguna pakai oleh pihak pendakwa, isu utama bukanlah sama ada tertuduh memandu 'dalam keadaan melulu dan cuai', tetapi bahawa dia melakukan kesalahan tersebut ketika memandu treler di jalan raya, sementara tubuhnya mengandungi alkohol dalam jumlah yang melebihi had yang ditetapkan, dan keadaan ini menyebabkan kematian atau kecederaan kepada keluarga si mati. Selain itu, dalam eksh P16, SP13 menyatakan bahawa tiada maklumat sama ada sebarang bahan pengawet ditambah ke dalam sampel yang dianalisis, dan jika tiada bahan pengawet ditambah, nilai yang diperoleh dari analisis kimia mungkin tidak mencerminkan kandungan alkohol sebenar dalam darah tertuduh ketika sampel diambil. Walaupun keputusan analisis sampel darah tertuduh memenuhi

syarat-syarat Akta, terdapat keraguan terhadap kandungan alkohol sebenar dalam darah tertuduh pada waktu kejadian, berdasarkan pemerhatian yang dibuat dalam eksh P16 oleh SP13. Ekshibit P16 yang digunakan oleh pihak pendakwaan mestilah bebas daripada keraguan, iaitu hasil analisis yang tepat. Dengan menerima eksh P16 walaupun terdapat pemerhatian daripada SP13, majistret telah melakukan kesilapan (lihat perenggan 23 & 26).

(2) Keterangan menyokong kes mengikut s 41(1) Akta, iaitu menyebabkan kematian akibat pemanduan secara cuai atau berbahaya. Pembelaan perayu berhubung cara pemanduannya yang menyebabkan kemalangan hanyalah penafian kosong. Keadaan brek kenderaan sebelum kemalangan adalah baik, bukan rosak. Penjelasan perayu tidak menimbulkan keraguan munasabah terhadap kes pendakwaan. Walaupun pendakwaan gagal membuktikan melampaui keraguan munasabah bahawa perayu memandu di bawah pengaruh alkohol di bawah s 44(1)(b), disebabkan keperluan teknikal untuk memastikan integriti sampel darah dikendalikan dengan betul, dia telah melakukan kesalahan memandu berbahaya di bawah s 41(1) Akta. Perayu telah, dengan memandu kenderaan dengan cara yang, mengambil kira keadaan (termasuk sifat, keadaan dan saiz jalan serta jumlah trafik yang ada atau dijangka di jalan) berbahaya kepada orang awam, menyebabkan kematian mangsa. Oleh itu, pertuduhan telah dipinda kepada s 41(1) Akta berkenaan kematian mangsa. Pertuduhan kelima dipinda daripada s 44(1)(b) kepada s 325 Kanun Keseksaan berkenaan kecederaan yang dialami oleh anak sulung si mati dan perayu dijatuhkan hukuman penjara dua tahun yang berjalan serentak. Jika dilihat kembali, ini tidak sepatutnya berlaku. Unsur 'secara sukarela' menyebabkan kecederaan serius mungkin tidak wujud pada pihak perayu. Hanya empat pertuduhan seharusnya dikenakan ke atas tertuduh. Tetapi, mahkamah adalah functus officio dalam hal tersebut (lihat perenggan 32, 36, 39 & 41–43).

(3) Pertimbangan kepentingan awam mengatasi kepentingan peribadi tertuduh dan hukuman ikat jamin di bawah s 294(1) Kanun Tatacara Jenayah adalah tidak sesuai. Memandangkan kesalahan ini adalah serius, bagi keempat-empat pertuduhan di bawah s 41(1) Akta, tertuduh dijatuhkan hukuman penjara selama lapan tahun dan denda RM20,000, jika gagal, tiga bulan penjara bagi setiap pertuduhan. Semua hukuman penjara berjalan serentak dan lesen memandunya juga digantung selama tiga tahun serta disahkan sewajarnya (lihat perenggan 49).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)
Letitia Bosman v PP and other appeals [2020] 5 MLJ 277, FC (refd)
Mat v PP [1963] MLJ 263 (folld)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Ng Beng Kok v PP [2017] MLJU 321; [2017] 7 CLJ 157, CA (refd)
Norisman bin Rozali v PP [2015] 3 MLJ 125, CA (refd)
Olivia Chong Oi Yun v PP [2020] 10 MLJ 19; [2020] 4 CLJ 246, HC (refd)
Poleon ak Ajan v PP [2010] 6 MLJ 136, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Wan Khairil bin Wan Isa [2007] 6 MLJ 601; [2007] 9 CLJ 557, HC (refd)
Sam Ke Ting lwn Pendakwa Raya [2023] 4 MLJ 650, CA (refd)
Sinnathurai Subramaniam v PP [2011] MLJU 1582; [2011] 5 CLJ 56, CA (refd)

Legislation referred to

Criminal Procedure Code ss 173(f)(i), 158, 294(1)
Penal Code s 325
Road Transport Act 1987 ss 41(1), 44(1), (1)(a), (1)(b), 45F, 45G(1)
Road Transport (Amendment) Act 1999

Ranjit Singh Sandhu (with Ahmed Faazil Rahman) (Ranjit Singh Sandhu & Co) for the appellant.
Mohd Waffy bin Ismail (Deputy Public Prosecutor, Deputy Public Prosecutor's Office for the State of Perak) for the respondent.

Noor Ruwena J:

[1] This grounds of judgment is prepared in respect of an appeal by the public prosecutor against the decision of this court on 18 June 2025, whereby the court dismissed the appeal against conviction of the appellant, Vethri Vel a/l Yamaplay, but substituted the conviction to a lesser charge and sentenced him accordingly. The court had found the appellant guilty convicted him of four offences under s 41(1) of the Road Transport Act 1987 (Act 333) ('the Act') instead. He was sentenced to eight years' imprisonment from 13 June 2025 and fine of RM20,000 in default of which he would be imprisoned for a period of three months for each charge and his driving licence was suspended for three years and endorsed accordingly, in accordance with the provision of the said section.

[2] The appellant has not filed any appeal as yet against the court's decisions. However, this grounds of judgment covers the reasons for the convictions and not just on sentence.

BACKGROUND

[3] The appellant was originally charged for two offences punishable under s 44(1) of the Act which read as follows:

Pertuduhan pertama

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak semasa memandu m/treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah mempunyai sebegitu banyak alkohol dalam badan sehingga kadar alkohol dalam darah kamu iaitu 201 miligram per 100 mililiter darah telah melebihi had yang ditetapkan dan kamu telah menyebabkan kematian

a) Mohamad Faiz bin Bakhari (920302–03–5711)

b) Muhammad Faqih Irsyad bin Mohamad Faiz (No Sijil kelahiran DT93735)

c) Nik Ifeka binti Nik Hassan (930301–03–5866)

d) Nik Iedayu binti Nik Hassan (900121–03–5570)

Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 44(1)(b) Akta Pengangkutan Jalan 1987.

HUKUMAN Apabila disabitkan hendaklah dihukum penjara selama tempoh tidak kurang daripada tiga tahun dan tidak lebih daripada sepuluh tahun dan denda tidak kurang daripada lapan ribu ringgit dan tidak lebih daripada dua puluh ribu ringgit.

Pertuduhan kedua

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak semasa memandu m/treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah mempunyai sebegitu banyak alkohol dalam badan sehingga kadar alkohol dalam darah kamu iaitu 201 miligram per 100 mililiter darah telah melebihi had yang ditetapkan dan kamu telah menyebabkan kecederaan kepada Muhammad Fariz Iskandar Bin Mohamad Faiz (170104-03-0151). Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 44(1)(b) Akta Pengangkutan Jalan 1987.

HUKUMAN

Apabila disabitkan hendaklah dihukum penjara selama tempoh tidak kurang daripada tiga tahun tahun dan tidak lebih daripada sepuluh tahun dan denda tidak kurang daripada lapan ribu ringgit dan tidak lebih daripada dua puluh ribu ringgit.

[4] The Sg Siput Magistrate's Court found the appellant guilty of both charges and he was sentenced to four years' imprisonment and fine of RM10,000 in default of which one year imprisonment for each charge. He was also disqualified from holding or obtaining a driving licence for five years. He paid the fines and was released on bail pending the appeal in the High Court.

[5] At the High Court, the appeal was heard on 28 March 2025 and 6 May 2025 and case adjourned for decision, which was delivered on 18 June 2025 after much deliberation on the issue of whether the charges under s 44(1) of the Act had been proved beyond a reasonable doubt. As stated above, the court found him guilty of a different offence. In respect of the second charge, the

court found him guilty under s 325 of the Penal Code, the rationale of which will be discussed further later in this grounds of judgment.

FACTS OF THE CASE

[6] On 13 February 2018, at about 10.20pm, a fatal motor vehicle accident occurred at KM 37 Jalan Ipoh–Kuala Kangsar involving a Proton Saga motor car bearing Registration No AGV 130 driven by the deceased and a prime mover with semi-trailer bearing registration No WUA 5761 and T/BD 6993 driven by the appellant ('the trailer'). In the car was the deceased's immediate family members comprising his wife, two sons and his wife's sister. The boys were aged three and one, respectively. Only his elder son, Mohamad Fariz Iskandar, survived the crash but the boy suffered severe traumatic brain injury as a result thereof.

[7] The trailer, which was owned by Arul Brothers Logistics Sdn Bhd, was heading from the direction of Ipoh towards Kuala Kangsar whereas the Proton Saga was heading in the opposite direction. The road was curved not far from the accident site. According to eyewitnesses, Zainudin bin Ismail ('SP5') and Mohamad Aliff bin Zainuddin ('SP7'), the Proton Saga had just come out from an eating shop by the road side and headed towards Ipoh. Suddenly, in the dark, they saw the trailer coming down fast from the curved fly-over towards the direction of Kuala Kangsar and encroached into the path of the Proton Saga (which had just stopped on the left side of the road) and rammed its front. The impact caused the car to spin a few times until it stopped near the road junction whereas the lorry turned over on its right side in the middle of the road. Members of the public called the police and soon after the police and ambulances arrived at the scene. Mohamad Fariz Iskandar was later sent to the Hospital Raja Permaisuri Bainun in Ipoh to be treated. The bodies of the victims were brought to the Sg Siput Hospital for post mortem. The post mortem conducted by Dr Fizatul Akmar bt Basri ('SP15') concluded that the infant died of 'severe head injury' whereas the cause of death of the other three victims was 'Polytrauma'.

[8] Pursuant to a police report lodged as per Sg Siput Report 150/20 by Konst Siti Hajar bt Muhammad Zuki ('SP3'), the investigation officer Insp Samuel Tan Sha Loong ('SP16') conducted investigation at the scene of the accident at 10.40pm. His initial investigation revealed that the trailer driven by the appellant lost control and encroached into the path of the Proton Saga. The point of impact was on the lawful path of the Proton Saga. After colliding into the car, the trailer turned turtle in the middle of the road, blocking the left lane and its cargo of building materials was spilled over on the road.

[9] The appellant was detained and brought to the same hospital for treatment as he had some slight injuries from the accident. The investigation officer had requested for the appellant's blood specimen to be taken for toxicology analysis. His blood specimen was taken by SP15 and was later sent to the Chemistry Department. Analysis was conducted by Siti Hajar Aisah bt Mohd Khamsi ('SP13') where 201mg per 100ml of ethyl alcohol was detected in the appellant's blood specimen as stated in exh P16.

[10] SP16's investigation was consistent with the findings of PUSPAKOM Officer, Rushdi bin Abdol Rahim ('SP11') in regard to the severe impact of the crash on both vehicles (refer to P13) and that of chemist Nurul Fadlina bt Harun ('SP12') who confirmed that the brown marks found on the motor car were similar to the colour of the building materials from the trailer. Therefore, SP12 was of the opinion that the impact happened when the front part of the Proton Saga collided into the load that was carried by the trailer. However, she was unable to determine the relative positions of both vehicles during the first impact (refer to the chemist report at P14). SP11's report showed that the impact of the crash was so severe that even the trailer's handbrake and brakes could not be tested by PUSPAKOM. The Proton Saga looked like it was a total write-off.

[11] The photographs of the vehicles showed multiple damages on both vehicles where the Proton Saga appeared to be a total wreck (refer to P4(1–27). The markings that SP16 found on the road too were consistent with the version given by both eyewitnesses in respect of how the accident happened (refer to the markings made by SP16 in the sketch plan P27). At the material time, the weather was fine, the road not busy with traffic and the lighting was a bit dark.

EVALUATION AND FINDINGS OF THE COURT

[12] During the hearing of the appeal on, counsel for the appellant submitted that there were numerous errors in the magistrate's decision when she did not take into consideration many facts which were in favour of the appellant and he had raised a reasonable doubt against the prosecution case. He raised 20 grounds in the petition of appeal but not all were pursued at the appeal. Nevertheless, I have summarised that the appellant's contentions may be summarised, inter alia, as follows:

(a) that the magistrate fell into error because of judicial misappreciation of the prosecution evidence in fact and in law;

(b) that the magistrate failed to consider that the appellant's urine test result was negative and overall failure to consider the defence case, which was said to be an afterthought; and

(c) that the magistrate and erred in law when she placed a higher burden of proof upon the appellant.

[13] The learned magistrate was satisfied at the end of the prosecution case that the ingredients of the offence had been proved and thereby called for defence. The court made a finding of fact that the trailer had encroached into the lawful path of the motorcar as below:

> [32] Berdasarkan keterangan lisan semua saksi dan juga keterangan sokongan yang dikemukakan di mahkamah, mahkamah mendapati tertuduh yang memandu laju di selekoh sehingga memasuki laluan bertentangan dan melanggar motokar yang dinaiki mangsa-mangsa merupakan pemanduan yang melulu dan cuai. Tertuduh sepatutnya lebih berhati-hati dan tidak memandu dengan laju dalam keadaan jalan berselekoh. Malah kenderaan yang dipandu tertuduh merupakan lori treler yang merupakan kenderaan panjang dan lebar yang sudah tentu jika dipandu secara melulu dan cuai boleh menimbulkan situasi merbahaya sehingga menyebabkan kemalangan yang membawa maut.
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> [33] Keterangan SP5 dan SP7 adalah konsisten mengenai bagaimana kemalangan berlaku. Keterangan bahawa lori treler tertuduh memasuki laluan motokar tersebut dan menyebabkan kemalangan gagal dipatahkan dan tidak dapat digugat oleh pihak pembelaan. Mahkamah berpuas hati bahawa SP5 dan SP7 merupakan saksi yang jujur malah mereka merupakan saksi yang berkecuali dan tiada apa-apa kepentingan di dalam kes ini. Tiada alasan untuk mahkamah tidak mempercayai keterangan SP5 dan SP7 ini.
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> [34] Oleh itu, bagi elemen ketiga s 44(1)(b) APJ 1987, Mahkamah mendapati pihak pendakwaan juga telah berjaya membuktikannya.

[14] At the end of the prosecution case, the duty of the court is to decide based on a maximum evaluation of all the evidence adduced by the prosecution whether it has proved a prima facie case as provided under s 173(f)(i) of the Criminal Procedure Code ('the CPC'). A prima facie was explained succintly by Justice Augustine Paul (as His Lordship then was) in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321 as follows:

> A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are a stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remain silent, he must be convicted. *Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of guilt of a prima facie case having been made out*. (Emphasis added.)

[15] It is trite law that an appellate court would not disturb the findings of the trial judge unless there were serious misdirections of fact and law, which I had found to be so and therefore, the conviction under s 44(1) of the Act was unsafe. It was the ingredient of the offence pertaining to the alcohol found in his blood sample that this court found to be lacking. I refer to the case of *Norisman bin Rozali v Public Prosecutor* [2015] 3 MLJ 125, where the Court of Appeal held:

> [17] *It is said that a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accept or reject the whole or any part of the evidence placed before him. He must when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. That is judicial appreciation of evidence*, (*see Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19). A trier of facts who makes finding based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal.
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> [18] It is incumbent on the part of the learned trial judge to indicate through his judgment his evaluation of the evidence. It is not sufficient to merely say 'I accept' or 'I believe' the evidence of the witness. Reasons and analysis of the evidence must be shown (*Murugiah v Public Prosecutor* [1941] 1 MLJ 17b). (Emphasis added.)

[16] What are the ingredients of the offence that have to be proved by the prosecution under the relevant s 44(1) of the Act? The provision states:

> 44(1) Any person who, when driving a motor vehicle on a road or other public place —
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> (a) is under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the vehicle; or
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> (b) has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit, and causes the death of or injury to any person shall be guilty of an offence and *shall, on conviction, be punished with imprisonment for a term of not less than three years and not more than ten years and to a fine of not less than eight thousand ringgit and not more than twenty thousand ringgit.
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> Note: previously — liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months and, in the case of a second or subsequent conviction, to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding one year or to both — see Act A1065.

[17] In the case of *Olivia Chong Oi Yun v Public Prosecutor* [2020] 10 MLJ 19; [2020] 4 CLJ 246, the High Court held that the ingredients of the offence were that:

> [47] What requires to be proven for the purpose of the charge under s 44(1)(b) of RTA as highlighted by the learned SCJ are:

that the appellant was the one driving the said motor vehicle on a road or public place and it was the said motor vehicle which caused the whole accident; that the alcohol level in the appellant's body exceeded the 'prescribed limit', the limit allowed by the law is 80mg of alcohol in 100ml of blood; and, and that the reckless driving of the appellant had caused the death of four persons and injury to another person.

[18] Therefore, the ingredients of the offence to be proved are:

(a) the accused was driving the said motor vehicle on a road or public place and caused the accident;

(b) the accused drove the vehicle while under the influence of alcohol where the level of alcohol in his blood exceeded the prescribed limit of 80mg alcohol in 100ml of blood; and

(c) the manner of the accused's driving caused the death of the deceased and three others person and caused injury to the deceased's son.

[19] The magistrate mentioned that the appellant had driven 'dalam keadaan melulu dan cuai'. Now, s 44(1)(b) does not specifically state those words. While sub-s (1)(a) provides the that the offence is driving under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the vehicle, sub-s (1)(b) which the prosecution relies on provides that it is an offence when a person is driving a motor vehicle on a road or other public place, has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit, and causes the death or injury of any person.

[20] Having perused the testimonies of all the witnesses, for both sides, I have no doubt at all that the appellant's manner of driving the said trailer had caused the vehicle to be involved in an accident with the deceased's car. It was the appellant's act in that regard which caused the deaths of the deceased and his family members as well as the serious injuries to his three year' old son, due to the said accident. The deceased's car was seen by SP5 and SP7 coming out from the side of the road where there was an eating shop, just moments before the accident happened. SP5 was riding his motorcycle right behind the ill-fated Proton Saga. Then he saw the trailer coming from the opposite direction down the curved road, into the latter's path. In his cross-examination, the witness SP5 told the court:

S: Encik kata 500 meter dari motokar tersebut. Dan encik kata kereta berhenti di tepi jalan. Masa dia berhenti encik di mana?

J: Saya di belakang motokar.

S: Kereta berhenti kan. Encik di mana?

J: Juga berhenti di tepi jalan di belakang kereta. Dalam 500 meter.

S: Kenapa motokar berhenti di tepi jalan?

J: Mungkin dia takut sebab itu dia berhenti tepi sebab lori sudah masuk laluan dia.

S: Kereta itu berhenti di tepi jalan dan lori langgar dia?

J: Ya bertembung di hadapan.

[21] The learned magistrate found that the witness SP7's testimony corroborated SP5's version (but it was from a different angle). This witness' house was very near the accident site. His evidence in examination-in-chief was that:

J: Pada 13.2.2020 dari apa yang saya nampak pada malam itu lori dari fly-over Sg Siput turun nak ke Kuala Kangsar, makan jalan sebelah kiri dan merempuh sebuah kereta sebelah driver dan kereta itu berpusing hingga ke simpang tiga Changkat Salak dan lori itu terbabas terbalik ke lorong kiri.

Masa kejadian ini saya berada di depan rumah. Rumah di Salak Stesen. Jarak rumah saya ke jalan berlaku langgar itu dalam meter saya tidak pasti tetapi rumah saya dari tempat saya duduk sekarang (tempat saksi) ke kerusi itu (kerusi di tepi pintu sebelah bench court sebelah kiri).

Saya boleh nampak dengan jelas apa yang berlaku. Kereta itu selepas lori langgar sebelah driver, kereta itu berpusing hingga ke simpang tiga Changkat Salak. Kereta itu tidak laju sangat sebab dia baru keluar dari kedai makan. Lori itu memang laju sebab dia baru turun bukit dari fly-over Sg Siput. Situ ada selekoh dan kawasan gelap.

[22] Prior to the horrific crash between the two vehicles, SP5 and SP7 saw the trailer encroaching into the path of the Proton Saga (which had just stopped on the left side of the road) and rammed its front. Additionally, SP5 told the court that the Proton Saga stopped at the side of the road as it appeared at that time, and he was of the view that the driver could have been afraid to proceed when he saw the trailer coming down fast from the flyover. True enough, the trailer lost control and the rest was history. While one might say SP5 was just stating his opinion, I found that SP5 who was no far behind the car, saw the trailer coming down fast from the curved flyover and encroached into the lawful path of the Proton Saga. It was a valid observation by SP5. The impact caused the car to spin a few times until it stopped near the road junction of Changkat Salak whereas the lorry turned over on its right side in the middle of the road, spilling its load onto the road (as can be seen in the photographs).

[23] Nevertheless, the court found the magistrate's use of the words 'dalam keadaan melulu dan cuai' in respect of the third ingredient of the offence, was not in accordance with the wording in s 44(1)(b) of the Act. As I have stated earlier, *sub-s (1)(b) which the prosecution relies on provides that it is an offence when a person is driving a motor vehicle on a road or other public place, has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the*

prescribed limit, and causes the death or injury of any person. Therefore, under s 44(1)(b) it was not the issue of him driving 'dalam keadaan melulu dan cuai' but that *he committed the offence when he was driving the trailer on the road, while having so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit, and caused the death or injury of the deceased's family and family members*. But if a person was driving under the influence of alcohol and lost control of the vehicle, such as the one that the appellant was driving, causing the accident such as the fatal nature of the accident on that night, one may naturally say that the driver drove 'dalam keadaan melulu dan cuai'. It is common knowledge what alcohol does to a person's central nervous system. In one website (open source), it states that 'It begins to affect the part of your brain associated with judgement and decision making, causing you to be more reckless and uninhibited. The alcohol also impairs the cells in your nervous system, making you feel lightheaded and adversely affecting your reaction time and co-ordination'. This is from the UK National Health Service website.

[24] In regard to the prescribed limit, s 45G(1) provides as follows:

> 45G(1) For the purposes of sections 44 and 45B to 45F —
>
> 'prescribed limit means' —
>
> (a) 35 microgrammes of alcohol in 100 millilitres of breath;
>
> (b) 80 milligrammes of alcohol in 100 millilitres of blood; or
>
> (c) 107 milligrammes of alcohol in 100 millilitres of urine.

[25] The prosecution adduced the evidence of the alcohol content in the appellant's blood (which was stated in P16 to be 201mg per 100ml of blood) through the provision of s 45F of the Act which provides:

> 45F Evidence in proceedings for an offence under sections 44 and 45 involving intoxicating liquor and section 45A
>
> (1) In proceedings for an offence under section 44 or 45 involving intoxicating liquor or in proceedings for an offence under section 45A, evidence of the proportion of alcohol in a specimen of breath, blood or urine provided by the accused shall be taken into account and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but the assumption shall not be made if the accused proves —
>
> (a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and
>
> (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings

are for an offence under section 44 or 45 involving intoxicating liquor, would not have been such as to make him incapable of having proper control of the vehicle.

(2) Evidence of the proportion of alcohol in a specimen of breath, blood or urine may, subject to subsections (4) and (5), be given by the production of a document or documents purporting to be either —

(a) a statement automatically produced by a prescribed breathanalyser and a certificate signed by a police officer (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the accused at the date and time shown in the statement; or

(b) a certificate signed by a government medical practitioner or government chemist as to the proportion of alcohol found in a specimen of blood or urine identified in the certificate.

(3) A specimen of blood shall be disregarded unless it was taken from the accused by a government medical officer; and evidence that a specimen of blood was so taken may be given by the production of a document purporting to certify that fact and signed by a government medical officer.

[26] The specimen was taken by the same doctor who performed the autopsy upon the victims. This was not a disputed issue. However, *in P16, the chemist stated that as there was no information whether any preservatives were added to the specimen that she analysed, and if none were so added, the value obtained from the chemical analysis may not reflect the actual alcohol content in the appellant's blood when the specimen was taken*. The defence attacked this issue because despite the result obtained in the analysis of the appellant's blood specimen in line with the requirements of the Act, *there was a doubt on the actual alcohol content in the appellant's blood at the material time, in view of the observation made in P16 by the Government chemist who was the prosecution's own witness*? No doubt a reading of 201mg off alcohol in 100ml of blood is very high to a layman as the prescribed limit is 80mg of alcohol in 100ml of blood. But in light of the seriousness of the charges against the appellant, P16 relied on by the prosecution on this ingredient of the charge must be free from any doubt, ie, *P16 must have the accurate result of the analysis*. That is why there is a requirement for preservatives to be added into the specimen taken and noted accordingly, before it is sent for analysis. This was the first observation made by the chemist SP13 in her witness statement as well as under the result stated in P16. *This is the only error made by the magistrate when she accepted P16 despite the observation made by SP13*. I noted that the appellant did not invoke the defence provided under s 45F as he denied consuming any alcohol that night prior to the accident.

[27] Additionally, SP16 testified that the appellant's urine sample to test for presence of narcotics was taken after his treatment in the hospital (for the

injuries suffered). Therefore, the defence attacked this evidence coming from the investigation officer himself to raise a doubt on the accuracy of the results obtained since he had been taking some medication at the hospital. SP16 testified further that he was unable to conduct a breathalyser test on the appellant because the *balai* did not have the equipment. That was why his blood specimen was taken to detect the presence of alcohol in the blood.

[28] Dr Rajindar Singh Randawa, a medical officer in anaesthetic and intensive care of Hospital Raja Permaisuri Bainun in Ipoh was called as the defence's witness, SD2. The purpose of calling this witness who did not examine or conduct any blood test on the appellant was to show that the first blood taking was very important to ensure it was untainted by any contamination. Therefore, one should take the blood first for specimen and testing before any medication are given to the patient. Additionally, blood taking after 4–5 hours of consumption of medication may change the result of a blood test because he stated 'there would be a metabolite and change the result'. Naturally, the DPP challenged the evidence of this 'expert' witness of the defence because he basically interpreted the reports that were supplied to him by the defence counsel. Nevertheless, his evidence in my view was 'neither here nor there'. If a person consumes medication and then his blood was taken for alcohol testing, I would think the result would show the *presence of some drugs and not alcohol in the blood specimen taken*. Therefore, I did not consider that his evidence destroyed the prosecution case. However, it was SP13's own evidence, in my view, that raised doubt on the prosecution case.

[29] The other thing that 'bothered' me was that SP16 concluded that the appellant had committed offences under s 44(1) of the Act based on P16, despite the observation made by SP13 in P16. However, despite being at the scene of the accident early, and he met the appellant there, no question was asked to SP16 whether he noticed any smell of alcohol upon the appellant's person when he met the latter at the scene. That was a very basic question to be asked, I thought. Even the doctor, SP15, although she was the one who advised SP16 to obtain the blood specimen for the alcohol content test and also drew the appellant's blood, did not observe the protocol provided in respect of preservation of a specimen (refer to Part 2 of *Borang Kimia* 15 Pin-2/2016 of P18). There must be a reason why it is provided as such in this *Borang Kimia*. However, the prosecution did not offer further evidence on this requirement and therefore, the benefit of doubt was given to the appellant. The court opined that if the doctor had been more 'attentive' to this requirement, there probably would not have been the adverse comment made by SP13 in P16.

[30] The defence also tried to raise a doubt that the brakes of the vehicle that he drove was not working properly and that he had complained to his supervisor/employer about it. However, the appellant admitted that despite

knowing about the faulty brakes, he broke the law by continuing to drive the vehicle. He blamed the faulty brakes which caused the accident to occur as he could not control the speed of the vehicle as he went down the fly-over. He agreed further that he should have been more careful as the area was dark at the material time (as can be seen in the photographs taken by SP16). Having considered the evidence led by the prosecution on this issue (refer to testimonies of SP1 and SP9 on this issue), I found there was no merit to this allegation by the appellant. Additionally, the appellant alleged that the faulty brakes problem had been conveyed to one Pratab a/l Pandiam but he was told to carry on driving the said prime mover and trailer.

[31] I refer to the learned magistrate's analysis of the defence case and in particular paras 43–44 below where she had considered the case for the defence based on all the evidence before her, and I could not find any fault in this:

> [43] Kemudian berkenaan dakwaan tertuduh bahawa terdapat masalah pada brek kenderaan dan telah dimaklumkan masalah tersebut kepada Pratab a/l Pandiam namun telah diarahkan untuk meneruskan perjalanan, penelitian terhadap keterangan SP1 dan SP16 mendapati penama Pratab a/l Pandiam ini tidak pernah ditimbulkan langsung kepada saksi-saksi pendakwaan. Sekiranya perkara ini benar tertuduh melalui peguambelanya mempunyai segala ruang dan peluang untuk memeriksa balas saksi-saksi pendakwaan terutamanya SP1 yang merupakan pengurus syarikat dan SP16 selaku pegawai penyiasat berkenaan perkara ini, tetapi ianya telah gagal dilakukan. Ternyata keterangan ini merupakan keterangan pemikiran kemudian atau afterthought dan tidak wajar untuk pihak pembelaan memindahkan beban memanggil Pratab a/l Pandiam sebagai saksi kepada pihak pendakwaan ...
>
> [44] Begitu juga dengan kewujudan foreman Raja yang dikatakan dihubungi oleh tertuduh untuk dimaklumkan berkenaan kerosakan brek. Tertuduh gagal untuk memanggil saksi ini memberi keterangan di mahkamah bagi menyokong keterangan tertuduh. Justeru itu, mahkamah mendapati keterangan tertuduh adalah bersifat penafian kosong tanpa disokong sebarang keterangan saksi lain ataupun keterangan dokumen.

[32] Therefore, this court had scrutinised all the evidence before it and found there was no merit on this ground too. The only issue which merited this court's interference is in respect of the second ingredient of the charge ie the alcohol content in the appellant's blood, which is a very important ingredient under s 44(1)(b) of the Act that the prosecution has preferred two charges against him. One was in respect of the death of four persons and the other was in respect of the only survivor of the accident. Based on the uncontroverted evidence before me, I had exercised my discretion under s 158 of the Criminal Procedure Code to amend the charges accordingly, namely in regard to the four victims who lost their lives that fateful night. The court found that the evidence supported a case of s 41(1) of the Act, ie causing death by reckless or dangerous driving. The provision of s 41(1) of the Act states:

(1) Any person who, by driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances or (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

[33] The learned magistrate had considered the ingredients of s 41(1) of the Act and discussed the case of *Ng Beng Kok v Public Prosecutor* [2017] MLJU 321; [2017] 7 CLJ 157 where the court of Appeal elaborated on the distinction between 'dangerous driving' and 'reckless driving'. In *Ng Beng Kok*, the court of Appeal stated the ingredients of s 41(1) of the Act were as follows:

The above section, in our view, creates three distinct offences, namely:

(a) driving a motor vehicle recklessly;

(b) driving a motor vehicle at speed; or

(c) driving a motor vehicle in a manner which, having regard to all the circumstances (including nature, condition and size of the road, and the amount of traffic, which is or might be expected to be on the road) is dangerous.

[34] *Public Prosecutor v Wan Khairil bin Wan Isa* [2007] 6 MLJ 601; [2007] 9 CLJ 557, the High Court had also laid down the ingredients as follows:

The essential ingredients then of the offence under s 41(1) of the Act are:

(a) a person who,

(b) by driving a motor vehicle recklessly; or

(c) by driving a motor vehicle at a speed; or

(d) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public;

(e) causes the death of person.

[35] The High Court later in the case of *Poleon ak Ajan v Public Prosecutor* [2010] 6 MLJ 136 made a distinction in the two categories of offences under s 41(1) of the Act which attracted the same punishment, one being dangerous driving and the other, reckless driving. The High Court discussed that reckless driving was a more serious offence than dangerous driving; case laws had decided that the ingredients of each category differed from the other, the distinction maybe fine but they were still obviously different. The learned

judge stated:

> Reckless driving
>
> To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it (per Vincent Ng J in *Public Prosecutor v Zulkifli bin Omar* [1998] 6 MLJ 65).
>
> Dangerous driving
>
> (1) In a case of dangerous driving, the prosecution must establish that:
>
> (a) a situation created by the accused is dangerous, eg, turning right into the said road without stopping to give way to through traffic; and
>
> (b) when creating such situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and relevant circumstances (per Raja Azlan Shah) (now HRH the Sultan of Perak) in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 at p 258. The appellant submitted that by failing to appreciate the principle of law governing the offence of reckless or dangerous driving, the honourable magistrate had misdirected himself as to whether the evidence in the present case was sufficient support the finding of either dangerous driving or the more serious category of reckless driving. (per Low Hop Bing J (as he then was) in *Public Prosecutor v Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334).

[36] Having scrutinised the defence of the appellant in regard to the manner of his driving which caused the accident, this court too was satisfied that it was just a bare denial. The condition of the brakes of the vehicle prior to the accident was good, not faulty. In his cross-examination, he was asked:

> S: Tetapi dalam kes ini Vejayakumar bos kamu beritahu Saiful yang semak kenderaan kamu dan kenderaan kamu dalam keadaan baik.
>
> J: Tidak setuju.
>
> S: Kamu ada di mahkamah masa Vejayakumar bagi keterangan.
>
> J: Betul. Saya ada dengar dia beri keterangan di mahkamah.
>
> S: Jadi mesti kamu dengar dia beri keterangan sedemikian.
>
> J: Tidak dengar.
>
> ...
>
> S: Encik tahu ada masalah sepatutnya encik berhenti di tepi jalan dapatkan bantuan foreman. Sepatutnya encik buat macam itu kan?
>
> J: Ya saya mengaku.
>
> S: Encik tahu ada masalah dan bahaya tetapi encik teruskan perjalanan.
>
> J: Sebenarnya saya tidak membawa lori, tetapi sebab bos yang minta bawa lori juga.

S: Siapa yang bawa lori itu pada hari itu? Walaupun bos cakap macam itu Kamu tetap teruskan perjalanan, betul atau tidak?

J: Ya, saya sendiri.

S: Adakah kamu setuju kamu sudah melanggar tugas kamu untuk memandu dengan cermat di atas jalan raya?

J: Ya saya mengaku.

...

S: Jadi adakah kamu katakan doktor berbohong dalam laporan perubatan?

J: Ya.

S: Kamu beritahu doktor kamu tidak ada pening tetapi dalam mahkamah kamu cakap kamu pening. Yang mana betul?

J: Pada masa kejadian saya hanya pening sahaja, tidak pengsan. Pada masa kejadian saya tidak tahu apa saya cakap.

S: Keterangan kamu adalah tidak konsisten.

J: Tidak setuju.

S: Keterangan kamu konsisten lah dari awal sehingga sekarang?

J: Ya keterangan saya konsisten.

S: Jika konsisten bagaimana ada percanggahan dalam keterangan ini (berkenaan pengsan).

J: Saya tidak tahu.

...

S: Keterangan kamu tidak konsisten. Tadi pada peguam kamu cakap Raja ada semak dan kata you punya lori dalam keadaan baik. Sekarang kamu cakap tidak. Mana satu yang betul?

J: Jika saya beritahu baru mereka akan check.

[37] He was evasive in his replies and the appellant probably thought he could get away with just denying everything and blaming the allegedly faulty brakes, despite the evidence given in regard to the condition of the brakes. In the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 it was held by the Supreme Court that:

To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused is sufficient. It is not however wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases, it is also not wrong for the court to conclude that the defence story is false or unconvincing, but in that instance, the court must not convict until it asks a further question, even if that court does not accept or believe the defence version, does it nevertheless raise reasonable doubt to his guilt? It is for this reason that in dealing with defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally

established 'reasonable doubt test' rather than to delve in the 'believable and 'convincing' test before applying the reasonable doubt ...

[38] Further, the Supreme Court stated:

> In this connection, counsel for the appellant had referred to us the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. *We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in Mat v Public Prosecutor* [1963] 1 MLJ 263 *go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case*. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal. (Emphasis added.)

[39] Applying the principle in *Mat v Public Prosecutor*, this court found that the appellant's explanation did not cast a reasonable doubt on the prosecution case. Even if the prosecution did not prove beyond a reasonable doubt that the appellant was driving under the influence of alcohol under s 44(1)(b), *due to the technical requirement of preserving the integrity of the blood specimen properly*, the court was satisfied that he had committed the offences of dangerous driving under s 41(1) of the Act. For a charge under this section, the question to be answered by the court is whether the accused created a dangerous situation in the manner of his driving: *Sam Ke Ting lwn Pendakwa Raya* [2023] 4 MLJ 650.

[40] The Court of Appeal in that case found that the dangerous situation was not as a result of the driver's manner of driving because according to SP46, the investigation officer, the appellant was driving in the correct lane. The accident occurred when the car collided into a group of 30 teenagers who were riding illegally modified bicycles on a public road at night. She was not the party that created the dangerous situation, neither was she driving against the traffic or overtaking other vehicles nor did her car skid off the course. The accident killed 8 of them instantly and injured another eight children. It was a tragic incident of course, but one that could have been avoided had they not created the dangerous situation that fateful night.

[41] In the present case, the doctor who conducted the post mortem (SP15) stated that the injuries sustained by all four victims were 'Dari kecederan luar

yang saya lihat mangsa boleh dapat kecederaan dalaman yang serius'. Hence, the victims all died due to injuries sustained from the motor vehicle accident and nothing else. There was not a lot of traffic that night in the present case, the road was a curved part of the fly-over heading downwards and it was dark. The condition of the road was based on the evidence of SP5 and SP7, and confirmed by SP16 in his investigation. The evidence on the manner of his driving came from the evidence of SP5, SP7 and the appellant himself. Therefore, this court concluded that the appellant has, by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, caused the death of the deceased, his wife, his sister-in-law (wife's sister) and his infant son. At the material time s 41(1) provided the following punishments:

(1) He shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine not less than five thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving license for a period of not less than three years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of conviction.

[42] Pursuant thereto, the court amended the charges to s 41(1) of the Act in regard to the deaths of the four victims as follows:

Pertuduhan pertama

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak sebagai pemandu motor treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah memandu kenderaan tersebut atas jalan raya dengan cara yang setelah mengambil perhatian tentang segala hal keadaan adalah merbahaya kepada orang awam sehingga menyebabkan kematian ke atas penama Mohamad Faiz bin Bakhari (920302-03-5711). Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

Pertuduhan kedua

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak sebagai pemandu motor treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah memandu kenderaan tersebut atas jalan raya dengan cara yang setelah mengambil perhatian tentang segala hal keadaan adalah merbahaya kepada orang awam sehingga menyebabkan kematian ke atas penama Muhammad Faqih Irsyad bin Mohamad Faiz (No Sijil kelahiran DT93735). Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

Pertuduhan ketiga

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak sebagai pemandu motor treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah memandu kenderaan tersebut atas jalan raya dengan cara yang setelah mengambil perhatian tentang segala hal keadaan adalah merbahaya kepada orang awam sehingga menyebabkan kematian ke atas penama Nik Ifeka binti Nik Hassan (930301-03-5866). Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

Pertuduhan keempat

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak sebagai pemandu motor treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah memandu kenderaan tersebut atas jalan raya dengan cara yang setelah mengambil perhatian tentang segala hal keadaan adalah merbahaya kepada orang awam sehingga menyebabkan kematian ke atas penama Nik Iedayu binti Nik Hassan (900121-03-5570). Oleh itu kamu telah melakukan sebuah kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

[43] There was a fifth charge which this court amended from s 44(1)(b) to s 325 of the Penal Code in respect of the injuries sustained by the deceased's three year old son and sentenced the appellant to two years' imprisonment for this offence, to run concurrently. On hindsight, this court should not have done so. The ingredient of 'voluntarily' causing the grievous may not be present on the part of the appellant. As such, there should have been only four charges against the appellant. However, this court is functus officio in that regard. It reads:

Pertuduhan kelima

Bahawa kamu pada 13/2/2020 jam lebih kurang 2220 hrs di KM 37.0 Jalan Ipoh-Kuala Kangsar, di dalam Daerah Sungai Siput (U) di negeri Perak semasa memandu m/treler bernombor pendaftaran WUA 5761 dan T/BD6993 telah menyebabkan kecederaan parah kepada Muhammad Fariz Iskandar Bin Mohamad Faiz (170104-03-0151). Oleh itu kamu telah melakukan sebuah kesalahan di bawah s 325 Kanun Keseksaan.

SENTENCE

[44] The appellant in his mitigation requested for the court's indulgence to grant him a bond over order under s 294(1) of the CPC citing that there were extenuating circumstances in the case, that he was a first offender and that he too was impacted by trauma from the incident and that he had cooperated with the police.

[45] However, the learned DPP objected to the request and pressed for a deterrent sentence. He urged the court to take into consideration that in this case, four lives from a family unit has been lost and the deceased's surviving son has been made an orphan due to the acts of the appellant. He also submitted that of late, there have been many instances of lives lost due to accidents involving heavy vehicles such as motorlorries and buses. He cited the case of *Sinnathurai Subramaniam v Public Prosecutor* [2011] MLJU 1582; [2011] 5 CLJ 56. I noted that the Court of Appeal there stated:

> [35] *The sentences imposed by the sentencing judges have a signalling effect. If the judge imposes a light custodial sentence, he is sending a message to the whole world at large, so to speak, that the offence is not that serious. And if the judge imposes a binding over under the Criminal Procedure Code, he is saying that the accused should not be charged in the first place at all. So, it can be deduced that when a judge imposes a sentence he is making a statement whether the offence is serious or trivial. It is in these contexts that sentencing judges must be very cautious and must weigh in a balance the gravity of the offence with the proposed sentence. The sentence imposed must always reflect public interest after taking into account the mitigation advanced by the accused*. On mitigation, Abdoolcader J (later SCJ) made these erudite remarks in *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186 at p 187; [1976] CLJU 116; [1976] 1 LNS 116:
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> > The respondent also puts forward in his plea in mitigation the fact that he is employed and supports an aged mother and step-brothers. He should of course have thought of this before committing the offences and not after; he is in fact pleading hardship arising from the consequences of his own acts and I would reiterate what I had occasion previously to observe in another case that an offender should not expect to excite or harness any sympathy on an ipse dixit by taking the stance of the impetuous youth who killed his parents with an axe and then pleaded in mitigation that he was an orphan. (Emphasis added.)

[46] In the case of *Letitia Bosman v Public Prosecutor and other appeals* [2020] 5 MLJ 277 which stated the following:

> [125] In passing sentence, the court takes into consideration the mitigating and aggravating factors in order to ensure that the sentence is in accordance with the law. Passing a sentence according to law means the sentence imposed must not only be within the ambit of the sentence period stipulated but also assessed and passed according to established judicial principles (see *Jafa bin Daud* at p 316 of the judgment of Mohamed Azmi J).

[47] In *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 the court held:

> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. *In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute*. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational. (Emphasis added.)

[48] Lastly, in a case where a full trial was conducted, it is pertinent to refer to the principle in the case of *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 in regard to sentencing, where the Supreme Court held:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v Ladd & Tristam* [1975] Cr LR 50; Thomas Encyclopaedia of Current Sentencing Practice p 1058:
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> > *We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified*.
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> *A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors*. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. (Emphasis added.)

[49] This court has taken into consideration the plea in mitigation, the DPP's rebuttal submissions and the relevant sentencing principles. The court must send a strong message to the general public at large that when one drives on the road or in a public place, he must be very cautious of other road users and be responsible for all his actions. A person may consume alcohol but he must do so responsibly. He must not drink and drive when he has consumed too much alcohol (ie over the limit prescribed by the law). In this case, public interest consideration outweighed the personal interests of the appellant and a sentence of bond over under s 294(1) of the CPC was not appropriate at all. In view of the severity of the offence, for the four charges under s 41(1) of the Act, I had sentenced him to eight years imprisonment and fine of RM20,000 in default of which he would be imprisoned for a period of three months for each charge. All imprisonment sentences to run concurrently from 13 June 2025. Also, for each charge, his driving licence was suspended for three years and to be endorsed accordingly.

CONCLUSION

[50] In the circumstances, this court found an error of fact and law which justified appellate interference in the finding, conviction and sentence of the magistrate's court under s 44(1)(b) of the Act, and substituted the charges and sentences accordingly.

Appeal against conviction allowed in part. Appeal against sentence dismissed.

Appeal against conviction allowed in part and appeal against sentence dismissed.

Reported by Nabilah Syahida Abdullah Salleh